United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 962

Case No. 1063: BRUER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Kevin Haugh; Ms. Marsha A. Echols;

Whereas at the request of Tia Bruer, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 November 1998 and 28 February 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 12 February 1999, the Applicant filed an application containing pleas which read as follows:

"**II. PLEAS**

7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules; and

(d) *To order* the Respondent to produce the most recent audit report conducted for the UNICEF Country Office in Yaoundé, Cameroun.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To reject* the findings of the Joint Appeals Board that the Applicant's allegations of prejudice had not been proven and that it could therefore not substitute its judgement for that of UNICEF;

(b) *To find and rule* that the decision of the Respondent not to renew the Applicant's contract was improperly motivated, procedurally flawed and fell short of the requirement of full and fair consideration;

(c) *To order* that the Applicant be reinstated with retroactive effect from 1 January 1997 with full benefits and entitlements;

(d) *To award* the Applicant compensation in the amount of $1,000,000.00 (one million dollars) in view of the exceptional circumstances of the case for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 11 October 1999;

Whereas the Applicant filed written observations on 30 March 2000;

Whereas, on 12 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 November 1990, on a two-month short-term contract at the P-3, Step-1 level (300 Series), in the Greeting Card Operation, Special Projects Section. The appointment was extended several times, with a short break in service between 30 April and 8 May 1991. Her appointment was further extended until 8 November 1991, when she received a fixed-term appointment under the 100 Series, and her functional title was changed to Design Officer. On 29 January 1992, the Applicant's functional title was changed to Manager, UNICEF House Visitors Center, Special Projects Unit, and she received a two-year appointment at grade L-3 (200 Series). The Applicant's appointment was further extended several

times through 30 September 1994. On 1 October 1994, the Applicant was appointed to a Project Personnel post, in the capacity of Basic Services Officer, at the L-3 level in Cameroon for two years, although she did not take up her post until 1 January 1995. Her fixed-term appointment was extended for a final three-month period to 31 December 1996.

On 17 March 1995, the Programme Planning Officer, Yaoundé, who was the Applicant's Supervisor, wrote a memorandum to the Applicant, inviting her to his office to discuss her performance evaluation report (PER) for the period 1 January to 31 December 1995. He attached a list containing a number of key assignments that would be the subject of the discussion.

On 5 May 1995, the Programme Planning Officer reminded the Applicant that she had to submit her work plan for the months of May and June 1995 for the Guinea Worm and Basic Services projects.

On 17 and on 24 August 1995, the Programme Planning Officer reminded the Applicant that her PER had not yet been finalized and requested her to submit an update on her work progress for discussion.

On 26 October 1995, the Programme Planning Officer requested the Applicant to submit a detailed report on all her assignments from the date of her arrival at the office.

On 2 January 1996, the Programme Planning Officer wrote to the Representative, UNICEF, Yaoundé, advising her of a meeting he had had with the Applicant on 19 December 1995 to discuss why she had not filled out her part of the PER, though she had been requested to do so. In view of the Applicant's lack of response to date, he forwarded to the Representative his evaluation report on the Applicant based on the most objective information available to him. According to the Programme Planning Officer, the case was one beyond his official capacity to solve "as it was not a simple problem of supervision" and needed to be dealt with at the appropriate level. He recommended that the Applicant be given an opportunity to demonstrate her capacity in an area in which they had evidence of her experience.

On 8 May 1996, the Applicant wrote to the Programme Planning Officer, referring to his memorandum of 2 January 1996 to the Representative. According to the Applicant, she had to function under "unfortunate and unprofessional circumstances", and, since her arrival in Yaoundé, it had been made clear to her that her presence was unwelcome. She went on to accuse the

Programme Planning Officer "with regard to this letter along with current and previous actions" of "unbecoming of professional conduct", deplored his "admission of guilt in signing off on someone else's false statements", and "encourage[d him] to verify his admission of guilt in writing to all parties who were in receipt of the letter".

On 9 May 1996, the Applicant wrote another memorandum to the Programme Planning Officer thanking him for taking time from his busy schedule to meet with her on the previous day to discuss the key assignments and objectives planned for the period ending on 30 October 1996.

Also on 9 May 1996, the Representative wrote to the Programme Planning Officer, in regard to the Applicant's work and performance. She asked him to discuss with the Applicant the type of assignment she was competent to do "without jeopardizing the office or the organization" and putting herself at risk. She referred to the fact that she had agreed to the Applicant's posting in Yaoundé by Headquarters "for reasons other than professional and competency requirements of the post ... provided that she could do the job". As this was not the case, a solution must be found that was "fair to the organization and the staff member".

On 6 June 1996, the Applicant received a memorandum from the Operations Officer, UNICEF, Yaoundé, requesting her to refrain from using abusive language when dealing with colleagues.

On 17 July 1996, the Programme Planning Officer wrote to the Representative, recommending that the Applicant's appointment not be renewed.

On 1 August 1996, the Representative wrote to the Personnel Office, Division of Human Resources, New York, confirming that she agreed with the recommendation not to renew the Applicant's contract.

On 30 September 1996, the Representative wrote to the Applicant, informing her that she had recommended non-renewal of her appointment to the Division of Human Resources, and that this recommendation had been submitted to the Appointment and Promotion Committee (APC) for review. Pending the review, her contract would be exceptionally extended until 31 December 1996.

The APC met on 24 October 1996 and, after a lengthy discussion endorsed the recommendation of the Office for non-renewal of contract.

On 31 October 1996, the Applicant wrote to the Director, Division of Personnel, New York, rebutting the "unsubstantiated and damaging allegations made by the [Representative]", and asking him to intervene in the matter.

On the same date, the Applicant was advised by the Personnel Office, Division of Human Resources, that the Executive Director had approved the non-renewal of her project personnel appointment upon expiration, effective at the close of business on 31 December 1996.

On 3 December 1996, the Applicant submitted a request for review to the Secretary-General, stating that the decision was motivated by prejudice.

On 10 December 1996, she submitted to the Joint Appeals Board (JAB) a request for a stay of action under staff rule 111.2 (c). In its report of 26 December 1996, the JAB recommended that the Appellant's request for suspension of action on the decision not to renew her fixed-term contract be granted and that, until the merits of the appeal had been dealt with by the JAB, her status as a staff member be preserved. On 30 December 1996, the Officer-in-Charge, Department of Administration and Management, advised the Applicant that the Secretary-General had decided not to accept the recommendations of the JAB.

On 27 February 1997, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, replied to the Applicant's request for review. She stated that UNICEF was satisfied that the non-renewal of the Applicant's appointment was exclusively based on her performance record and that the process that led to this decision was fair and free from prejudice. All relevant documentation was shared with the Applicant and the decision promptly communicated to her. Moreover, her allegations of discrimination could not be relied on, since her statements in this regard had proven untrue. According to UNICEF, her case was handled fairly, and in a reasonable manner, in accordance with established rules and with full regard to her right to due process.

The Applicant lodged an appeal with the JAB on 20 March 1997. The JAB submitted its report on 29 April 1998. Its considerations and recommendation read as follows:

"*Considerations*

...

19. In considering [the] Appellant's allegations of prejudice and other extraneous considerations, the Panel recalled the consistent position of the Administrative Tribunal that the burden of proof of these allegations rests on [the] Appellant. It concluded that she had failed to provide that proof, either with respect to the UNICEF Office in Yaoundé or to the Administration at UNICEF Headquarters. ...

20. Similarly, the Panel could find no evidence of procedural irregularities in the decision not to renew [the] Appellant's contract. ...

21. The absence of PERs for the period of [the] Appellant's service in Cameroon might be seen as a procedural defect in the review process. However, the Panel established to its satisfaction that the failure to produce the PERs was substantially – if not solely – the responsibility of [the] Appellant. It noted that, by not completing her portions of the reports, and subsequently availing herself of the rebuttal process, [the] Appellant had deprived herself of a procedural safeguard.

22. As to the charge of violation of the principle of fair treatment, the Panel considered that the decision by UNICEF to place her in a post for which she lacked qualification might be considered to have an element of unfairness. However, the Panel noted that she had accepted it, apparently without reservation, at the time.

23. The Panel noted that [the] Appellant's allegations of discriminatory treatment by [the Representative, UNICEF, Yaoundé] had remained without response from UNICEF. The Panel further noted that UNICEF Headquarters also failed to respond to two (or more) recommendations from [the Representative] that an assignment be found for [the] Appellant for which she was better qualified. These failures by the Administration are susceptible to more than one interpretation, but not, in the view of the Panel, one of abuse of authority.

24. The Panel reviewed [the] Respondent's contentions ... On the issue of expectancy, it felt that it needed only add that in addition to the lack of legal basis for an expectancy of renewal of a 200 Series appointment, there was no assurance, either formal of informal, by the Organization which could be considered the basis for a moral expectancy of renewal.

Recommendation

25. The Panel makes no recommendation with respect to this appeal."

On 15 May 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Panel's considerations, and has particularly noted the Panel's conclusions that you failed to provide proof of prejudice or other extraneous factors, that there was no evidence of procedural irregularities in the decision not to renew your contract, and that there was no legal or moral basis for expectancy of renewal of your appointment. He has taken note that the Panel made no recommendation with respect to your appeal and, accordingly, the Secretary-General has decided to take no further action in your case.

..."

On 12 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. She has a right to fair consideration for extension of her fixed-term appointment having served satisfactorily on successive short and fixed-term appointments with UNICEF for more than five years. While there is no absolute right to renewal of such contracts, an exception for renewal may be inferred from the circumstances surrounding the decision. The Applicant came to the post with the clear understanding that she would remain with UNICEF until her retirement and, based on this understanding, she gave up her United States permanent residency and the survivor's benefits from her husband's pension.

2. The decision whether or not to renew a contract must not be made in an arbitrary or capricious manner. The decision not to renew her fixed-term appointment was vitiated by procedural defects and denial of due process. It was based on her contested performance evaluation, which she believed was tainted by prejudice against her on the part of the UNICEF Country Representative and which was never finalized. She was further denied due process when the decision on her contractual status was decided before the rebuttal process for her contested 1995 PER was completed and before her 1996 rebuttal was even produced, rendering her right to rebuttal meaningless.

Whereas the Respondent's principal contentions are:

1. The Applicant held a fixed-term appointment under the 200 Series of the Staff Rules, which does not carry any legal expectancy of renewal. Non-renewal of the Applicant's appointment did not violate her rights.

2. The Respondent's decision not to renew the Applicant's contract was not an abuse of discretion; there were no procedural irregularities, and the decision was not motivated by prejudice or other extraneous factors. The Respondent did not make any promise of continued employment to the Applicant.

The Tribunal, having deliberated from 12 July to 2 August 2000, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 15 May 1998, in which the Secretary-General accepted the JAB's recommendation against reinstating the Applicant. The Applicant claims that under her fixed-term appointment she had "a legal expectancy" of renewal. She further claims that the non-renewal of her fixed-term appointment was an abuse of discretion, prejudicially motivated, procedurally flawed, and fell short of the requirement of full and fair consideration.

II. Insofar as the case concerns the legal expectancy involved in the renewal of fixed-term appointments, the Tribunal affirms the recommendations of the JAB, and the Respondent's acceptance of those recommendations.

As a fixed term employee under the 200 Series of the Staff Rules, the Applicant's expectations were squarely governed by staff rule 204.3, which stipulates:

> "(a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be for service in one or more mission areas, and may be for short, intermediate and long term, as defined in rule 200.2 (f).
>
> ...

(d) A temporary appointment does not carry any expectancy of renewal."

The 200 Series permits UNICEF to separate a staff member appointed under that series from a post upon expiration of his or her appointment even without prior notice and without prior regard to either the quality of the services that the staff member rendered or without providing any other reason. It is essentially an at-will employment. A long history of precedents in the Tribunal supports this interpretation. (Cf. Judgements Nos. 614, *Hunde* (1993); No. 885, *Handelsman* (1998)).

There is some precedent for discretionary departure from these rules when sufficient countervailing circumstances exist. Such countervailing circumstances may include: (1) an abuse of discretion in not extending the fixed-term appointment; and (2) an express promise by the Administration that gives the staff member a legal expectancy of renewal. (Cf. Judgement No. 885, *Handelsman* (1998).

III. The Tribunal takes up first the question of whether there was a promise of renewal, implicit or explicit.

The JAB considered the Applicant's argument that she had a legal expectancy of renewal. It said:

> "... On the issue of expectancy, [the Board] ... needed only to add that in addition to the lack of legal basis for an expectancy of renewal of a 200 Series appointment, there was no assurance, either formal or informal, by the Organization which could be considered the basis for a moral expectancy of renewal."

The record supports this conclusion. There was no evidence that her decision to relinquish her United States residency status and to forgo her deceased husband's death benefits was tied in any way to a promise of future employment at the United Nations. There is nothing in the record to show that UNICEF gave her any assurances that her assignments would lead to a permanent contract. The Applicant had no expectancy of renewal of her 200 Series fixed-term appointment,

and the non-renewal did not violate her rights. Therefore, the Tribunal affirms the recommendation of the JAB on this point.

IV. The Applicant argues strenuously that there was not only an abuse of discretion in her non-renewal, but procedural irregularity, prejudice, and improper motivation. In addition, she contended that her non-renewal fell short of the requirement of full and fair consideration. The record is in fact replete with evidence of conflict between the Applicant and the Representative, Cameroon. The JAB exhaustively reviewed and discussed the materials submitted by the parties with regard to this conflict.

A clear case of fault on the part of the Representative does not emerge from the facts before the JAB. The JAB summarized its views:

> "The Panel would wish to record its view that, aside from the facts enumerated above and despite lengthy and extensively documented submissions from both parties, the facts in this case are particularly difficult to establish. Virtually nothing put forward by one party is left unchallenged by the other."

In any event, the Tribunal finds that the JAB made every effort to discern the facts of the situation, and the Tribunal has no basis for overturning their considered report.

Furthermore, the JAB found no irregularities in the process. Though there were some delays in the documentation of the Applicant's non-renewal from Headquarters, the Tribunal remains unconvinced that these delays constituted a violation of due process.

V. A troubling element of this case is that there are no PER's for the period in question, which could be the basis for review of the Applicant's performance. The Tribunal notes that the Applicant herself failed to sign her PER's in 1995 and 1996 covering the period of her assignment in Cameroon and did not complete Part 2 (Work Planning) of her 1996 PER. The Applicant's failure to do so virtually foreclosed any possibility of review regarding her performance on that assignment. Thus the Applicant's failure to sign her PER's as required by the rules and as requested

in writing on numerous occasions precluded the Administration from assessing her performance and making a decision based thereon.

VI. Moreover, the Tribunal has consistently held that "[t]he burden of proving prejudice or improper motivation rests with the Applicant". (Cf. Judgements No. 93, *Cooperman* (1965), para. XII; No. 470, *Kumar* (1989), para. IV). The Applicant did not meet that burden in this case.

VII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Kevin HAUGH
Member

Marsha A. ECHOLS
Member

Geneva, 2 August 2000

Maritza STRUYVENBERG
Executive Secretary